IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

L.C. SUIT NO. 1432 OF 1980

Ajeet Kumar C. Mudnaney of
Bombay Indian Inhabitant residing
at 4-C, Raghav Wadi, Fresh Bridgade,
Bombay 400 007. ... Plaintiff

Versus

1. Prithvi Construction Pvt. Ltd.
a company incorporated under the
Companies Act, and having its
registered office at 501, Commerce
House, 110, Medows Street, Fort
Bombay.

2. M/s. Dhanlaxmi Trading Company,
Care of Pruthvi Construction Pvt.
Ltd. 501, Commerce House, 110,
Medows Street, Fort, Bombay.

3. Ganeshchandra Kalicharan of
Bombay Indian Inhabitant, residing
at Flat No. A-1, 4th Floor, Prithvi
Apartments, Altamound Road,
Bombay. ... Defendants

Mr. S.F. Rego i/by Mr. N.J. D'Monte for Plaintiff.

Mr. M. Ghelani with Mr. Ali i/by Law Charter for Defendant No. 1.

Mr. P.G. Sawant, A.G.P. for State.

CORAM : F.I. REBELLO,J.
DATED : 01ST SEPTEMBER, 2005

ORAL JUDGMENT :

. The Plaintiff has filed the present suit for declaration that there is valid subsisting and binding agreement for sale between Plaintiff and defendant No. 1 in respect of Flat No. A1, on the 4th Floor of Prithvi Apartment, Altamount Road, Bombay as pleaded in Paragraph 4 of the plaint. Various consequential reliefs have been prayed for including that Defendant No. 3 be ordered and decreed to hand over possession of Flat No. A-1, 4th Floor, Prithvi Apartment, Altamount Road, Bombay. In the alternative the Plaintiffs have prayed that the defendants be ordered to pay to the Plaintiffs a sum of Rs.80,000/- with further interest at the rate of 15% p.a. from the date of the suit till payment as also to pay to the Plaintiff a sum of Rs.4,02,504 or such other sum as damages together with interest at the rate of 6% p.a. from the date of the suit till payment. It is not necessary to advert to other reliefs. In Para No. 4A of the plaint which was brought by an amendment, the Plaintiff has set out his case based on the agreement. Plaintiff has pleaded that defendant No 1 had issued an advertisement in January, 1977 to the effect that flats on ownership

basis were available for sale by the 1st defendants in the said Prithvi Apartment. Plaintiff after coming to know of the same, contacted defendant No. 1. There were negotiations and Plaintiff agreed to purchase from first defendant on ownership basis, flat being flat No. A1 on the 4th Floor, at the rate of Rs.152 per sq. ft. On 6.1.1977 Plaintiff paid first defendant a sum of Rs.20,000/- by cheque towards earnest money and a further sum of Rs.20,000/- on 13.1.1977 by another cheque in favour of first defendants. Over and above, the aforesaid sum of Rs.40,000/-, Plaintiff had paid further sum of Rs.40,000/- in January, 1977 for which no receipt was passed. The first defendant handed over to the Plaintiff the usual printed copy of the agreement generally executed by the 1st defendants for sale of flats in Prithvi Apartments along with typical floor plan of Prithvi Apartments. However, no formal agreement was executed. By the amended Para 4A Plaintiffs has pleaded that the defendants were bound to execute and sign the formal agreement in terms of the printed copy and to have the same registered as per the provisions of law. The Plaintiff has submitted

that this Hon'ble Court would direct and or order the defendants to enter into and or sign the agreement as per the agreement, a copy of which was given to the Plaintiff and in the event of the defendants not doing so, to appoint an officer of this Hon'ble Court to sign, execute and to get the same registered as per the provisions of law.

2. The Plaintiff has then pleaded that as there was no progress in the construction of work during the year 1977-78 and during this period, the Plaintiff reminded the first defendant and in particular Manu Gala to execute the said formal agreement. The first defendant promised to do so stating that the Plaintiff was a professional man and that he should not worry. The Plaintiff's case is that the Plaintiff even offered to pay the balance of the purchase price to the first defendant. The first defendant however, stated that they would take money from Plaintiff afterwards. Plaintiff states that Manu Gala became friendly and created a confidence in the Plaintiff and by reason thereof the Plaintiff relied on the representations made by the said Manu Gala and

assurances given by him on behalf of the 1st Defendant. The Plaintiff was therefore, surprised to receive a letter dated 5.8.1977 addressed by the first defendants whereby they purported to remind the Plaintiff to take back the deposit of Rs.40,000/-. In that letter the first defendant referred to an earlier letter dated 19.5.1977 which was according to Plaintiff was not received by the Plaintiff. In the letter of 5.8.1977, it was set out that in the event the Plaintiff did not collect the amount deposited, the same would be forefeited. The Plaintiff approached Manu Gala and explained the correct facts and reiterated that he was ready and willing to pay the balance amount against the possession of the said flat and execution of the formal agreement. Though Manu Gala pretended to be sympathetic towards the Plaintiff, on one pretext or the other the agreement was not entered into with. Plaintiff by letter dated 5.1.1978 expressed his surprise over the letter of 5.8.1977 and recorded that he had not received letter of 19.5.1997 and stated that Plaintiff was ready and willing to perform his part of the contract. Reference is then made to correspondence exchanged

between the parties. It is the case of the Plaintiffs that there is a subsisting contract for sale of the flat at the rate of 152 per sq. ft. by the first defendant in favour of the Plaintiff. Plaintiff intimated plaintiff's readiness and willingness to perform his part of the agreement. The first defendant, it is contended have wrongfully failed to enter into the agreement and have failed and neglected to carry out and perform the said agreement. It is further set out that the first defendant wants to wrongfully back out of the agreement and the second defendants are nominees and benamidars of the first defendants. The second defendant, it is set out had notice of agreement between Plaintiff and 1st defendant in respect of the flat A-1, on 4th Floor of Prithvi Apartment and at any rate, would have come to know about such agreement. It is pleaded that there exists no standard for ascertaining damages or compensation for non performance by way of monetary compensation. Alternatively, it has been pleaded that if the court comes to the conclusion that relief for specific performance cannot be granted, then Plaintiffs should be paid back the sum of

Rs.80,000/- paid by the Plaintiff to first defendant as also a sum of Rs.4,02,504/- being the damages suffered by the Plaintiff as a result of breach of contract. By an amendment Para 6A has been introduced to challenge the agreement between Defendant No. 1 and 3. It is the contention of the Plaintiff that Defendant No. 3 is nominee and or benamidars of 1st defendant and is colluding with the first and defendant. Further third defendant had or deemed to have notice of the agreement entered into between 1st defendant and the Plaintiff. It may be mentioned that by an amendment Para 8A, was introduced whereby a declaration is sought that the Provisions of Section 4 of the Maharashtra Ownership Flats Regulation of the permission of construction Management and Transfer Act, 1963 is illegal null and void. It is not necessary to further deal with the other pleadings as no argument has been advanced at the bar on this issue nor any evidence led.

. Plaintiffs have relied on various documents.

. Defendant Nos. 2 and 3 have not filed any written statement. Written Statement has been filed on behalf of Defendant No. 1. It is the case of Defendant No. 1 that some time in January, 1977, Plaintiff approached defendant and after making enquiry decided to purchase flat No. A-1 on the fourth floor of the proposed building under construction by the defendant known as Prithvi Apartment. Plaintiff was informed that the said flat was already agreed to be sold by one Manibai Parasmal. Plaintiff was however, informed that if he was interested in purchasing the flat, this defendant might be able to persuade said Manibai to cancel the agreement with her as regards the said flat and/or release the said flat so that the same can be sold to the Plaintiff. The defendant however, wanted some assurance from the Plaintiff about his bona fide interest in purchasing the said flat so that this Defendant may take the trouble and expenses of having the said agreement with the said Manibai cancelled. In order to show his bona fides the Plaintiff agreed to deposit with defendant a sum of Rs.50,000/- and requested the defendant to expeditiously proceed to negotiate for

that purpose with the said Manibai. It is further pleaded that Plaintiff further agreed that if the Plaintiff failed to enter into an agreement for the purchase of the said flat with Defendant No. 1, the defendant No. 1 would be entitled to forfeit the amount which the Plaintiff was to deposit with Defendant No. 1 as mentioned hereinabove as and by way of liquidated damages. The Plaintiff requested Defendant No. 1 to accept that the said sum of Rs.50,000/- in instalments which the Plaintiff agreed to pay to this Defendant upon the arrangements being made by the Plaintiff in this behalf. The defendants contends that Plaintiff in aggregate paid sum of Rs.40,000/- by two cheques of Rs.20,000/- each respectively dated 6th and 13th January, 1977. The Plaintiff however, failed and neglected to pay the balance deposit of Rs.10,000/- inspite of his assurance that he would pay the same. In the meanwhile and in anticipation of the Plaintiff making payment of the balance sum of Rs.10,000/- as per his assurance, Defendant No. 1 in good faith initiated negotiations with the said Manibai and obtained surrender of the said flat by her and/or cancellation of her agreement with

defendant in that behalf. The Plaintiff, however, failed to contact the defendant for the purpose of making any inquiries in respect of the said flat or the cancellation of the agreement with the said Manibai or to pay the balance sum of Rs.10,000/- as stated above. Defendant No. 1 thereupon became entitled to forfeit the deposit of Rs.40,000/-. Defendant No. 1 addressed to the Plaintiff a letter dated 19th May, 1977, recording that the Plaintiff had failed to deposit the balance sum of Rs.10,000/-, defendant requested the Plaintiff to collect a cheque for the said sum of Rs.40,000/-. The Plaintiff failed and neglected to reply to defendant's letter dated 19th May, 1977 or to contact the defendant. In the circumstances, by a registered A.D. letter dated 5th August, 1977 the defendant once again reminded the Plaintiff to come and collect the deposit failing which the defendant informed the Plaintiff that the said amount would be forefeited. The defendant also pointed out in its letter dated 5th August, 1977 that this Defendant had already become entitled to forfeit the said amount but as a gesture of good will the defendant had made the said offer of refunding the

said sum of Rs.40,000/-. Plaintiff however, failed and neglected to reply to Defendant's letter dated 5th August, 1977, untill 5th January, 1978. By that letter, addressed to this Defendant the Plaintiff falsely denied receipt of the Defendant's letter dated 19th May, 1977 and purported to record that an oral agreement was already entered into between the Plaintiff and Defendant No. 1 for the sale of the said flat which was purported to be set out in the Plaintiffs letter dated 5th January, 1978. Correspondence thereupon ensued between the Advocates of the Plaintiff and Defendant No. 1 respectively on their behalf wherein defendant No. 1 recorded the facts of the case and denied any agreement having been entered into in respect of the said flat with the Plaintiff and, inter alia pointed out that the Plaintiff was not entitled to obtain any specific performance of the alleged agreement. The defendant states that after obtaining cancellation of agreement with the said Manibai and surrender of the said flat from her, the Defendant became entitled to dispose of the said flat. As the Plaintiff had not entered into any agreement with Defendant, and as the Plaintiff

failed and neglected to pay the balance sum of Rs.10,000/- and to contact Defendant for the purpose of entering into agreement in respect of the said flat, defendant entered into an agreement to sell the same to Velhari Trading Co. Pvt. Ltd. on or about 2nd June, 1977. On or about 14th October, 1977, Velhari Trading g Co. Pvt. Ltd. desired to purchase flat No. B2 on the 19th floor of the said Building in exchange for and in lieu of the said flat which request was acceded to by Defendant. On or about 11th October, 1978 one Ganeshchandra Kalicharan entered into an agreement with Defendant No. 1 for purchase of the said flat for a total consideration of Rs.2,32,220 and has already paid the full purchase price thereof. The said Ganeshchandra Kalicharan has been on or about 10th May, 1980 given possession of the said flat for the purpose of carrying out interior decoration and furnishing of the said flat. The defendant says and submits that the said Ganeshchandra Kalicharan is a bona fide purchaser for value without notice and this Defendant has entered into a valid, binding and subsisting agreement with him in respect of the said flat. The defendant has

denied that Plaintiff was ready and willing to perform his part of any alleged agreement. Defendant says that the question of the Plaintiff being ready or willing did not arise in view of the fact that there was no agreement. Various other pleadings by the Plaintiff have been denied.

. In so far as receipt of Rs.80,000/- the same is denied. The defendant has admitted only receipt of Rs.40,000/- and the said amount has been properly and legally forefeited as set out in the defendant's advocate letter dated 3.2.1978. The defendant has denied that Plaintiff suffered any damages. It is pointed out that the flat has been sold and consequently it is pointed out that the suit should be dismissed.

4. Based on the pleadings issues were framed on 17.1.2003 which are reproduced hereinbelow :

ISSUES

1. Is the suit is bad for

non-joinder of necessary
and/or proper parties?

2. Does the Plaintiff prove that valid, binding, concluded and enforceable contract was arrived at between the Plaintiff and 1st Defendant for sale of Flat No. A-1, 4th Floor, Prithvi Apartment, Altamount Road, Mumbai, as alleged in Para 4 of the Plaint?

3. Does the Plaintiff prove that the Plaintiff paid to the 1st Defendant a sum of Rs.80,000/- as alleged in Para 4 of the Plaint?

4. Does the Plaintiff prove that the alleged Agreement between 1st Defendant on the one hand and 2nd Defendant on the other is concocted and fabricated as alleged in Para 6 of the Plaint?

5. Does the Plaintiff prove that he was at all time ready and willing to perform his part of the alleged Agreement?

6. Does the Plaintiff prove that Section 4 of the Maharashtra Ownership Flats Act and more particularly Section 4 thereof is invalid and of no legal consequences as alleged in Para 8A of the plaint?

7. Does Defendant No. 1 prove that the suit is misconceived and discloses no cause of action as alleged in para 1 of the Written Statement of Defendant No. 1?

8. Does the Defendant prove that the Plaintiff is guilty of gross delay and serious latches as alleged in para 1 of the Written Statement of Defendant No. 1?

9. Does Defendant No. 1 prove that the sum of Rs.40,000/- was received as set out in Par 2 of the plaint?

10. Is Sureshchandra Kalicharan a bona fide purchaser for value without notice as stated in Para 2(c) of the Written Statement of Defendant No. 1?

11. Does the Plaintiff prove that he is entitled to specific performance of the agreement as alleged in Para 4 of the plaint?

12. Is the Plaintiff in the alternative entitled to be paid damages of Rs.80,000/- together with further interest thereon @ 15% p.a. or in the sum of Rs.4,02,504/- together with interest @ 6% p.a. as prayed?

13. Is the Plaintiff entitled to costs?

14. What reliefs?

5. No arguments have been advanced in so far as Issue Nos. 1 and 6 are concerned and therefore, these issues are not required to be answered.

6. In so far as Issue No. 7 is concerned, the fact that the issues have been framed and parties have led evidence, would itself indicate that there are triable issues and in that light of the matter, issue No. 7 has to be answered in the negative.

8. Considering that the suit is for specific performance and in the alternative for damages, all connected issues will have to be answered. As such Issue Nos. 2, 3, 4, 5, 8, 9, 10 and 11 will have to be answered together as those deal with the issue of specific performance of the contract. Issue No. 12 will have to be answered separately as that pertains to the relief of damages.

. On behalf of the Plaintiff, Plaintiff has examined himself. On behalf of the defendants, Mr.

Jigar Shah, Director has been examined, as also Vasant Dharmaji Gada as P.W. No. 2. Both the parties have also led evidence by way of documentary evidence which has been marked and taken on record.

9. In order to succeed, Plaintiff must establish that there was a concluded agreement between the parties and terms of the agreement which were agreed to. Plaintiff also will have to prove that he was always ready and willing to perform the agreement which was entered into between the parties. Let us therefore, examine the evidence of the Plaintiff and defendant to find out if there was a concluded agreement between the parties for the sale of flat No. A1 on the fourth floor and the terms and conditions thereof were agreed. We have already noted the pleadings by the Plaintiff that what was agreed to be sold was flat No. A1 on the 4th Floor at the rate of Rs.152/- per sq. ft. By way of the pleadings, Plaintiff has set out that the agreement was to be in terms of the draft agreement, a copy of which was given to the Plaintiff. Therefore, what emerges from this

pleadings is that the flat to be purchased was identified. The rate per sq. ft. was settled and the agreement was to be in terms of the copy which was given to the Plaintiff. Plaintiff also gave Rs.40,000/- as earnest money by two cheques dated 6.1.1977 and 13.1.1977 and according to the Plaintiff an additional amount of Rs.40,000/- for which no receipt was passed. In his evidence on affidavit Plaintiff has deposed that the flat to be purchased was Flat No. A1 on the 4th Floor at the rate of Rs.152/- per sq. ft. and that he paid Rs.40,000/- by two cheques one of 6.1.1977 and other of 13.1.1977. One such receipt is produced as Exh. P2 which shows that defendant No. 1 has received a sum of Rs.20,000/- against Flat No. A-1, 4th Floor in Prithvi Apartment, at Altamount Road. He has also deposed that he has paid additional Rs.40,000/- in cash for which no receipt was issued. It has also come in the evidence of the Plaintiff that first defendant gave usual printed agreement which is executed by the first defendant for the sale of flats in Prithvi Apartment and defendants are bound to execute and sign the agreement. In his cross examination,

Plaintiff has deposed that the price settled was Rs.152/- per sq. ft. and that was to be reflected in the agreement. He has also deposed that the defendant No. 1 was directed to pay in cash certain amount which was not to be reflected in the agreement and that was to be over and above Rs.152/-. The witness stated that he was to pay Rs.40,000/- in cash over and above Rs.152/- per sq. ft. The amount was to be paid at the time of execution of the agreement being earnest money. The earnest money was to be paid first and at the time of execution of agreement Rs.40,000/- was to be paid. The witness has deposed that the earnest money was fixed at Rs.20,000/- and after that Rs.20,000/- was to be paid within a week. Thereafter, within one week Rs.40,000/- was to be paid in cash. Defendant No. 1 also informed Plaintiff, that they will inform him about the progress of the construction and that he should make payment slabwise. The witness has deposed that defendant had not asked him to make payment as per Clause 4 of Exh. P9. Exh. P9 is an unsigned agreement for sale and Clause 4 provides the manner in which the amount was to be paid. The witness

states that he was not required to make further payments untill he was called upon by the defendants in writing to pay the amounts. He was not called upon to make payment. The witness is not able to recollect when he has paid Rs.40,000/- cash but he contends that it must be within 7 to 10 days from the second payment. The amount of Rs.40,000/- was paid from accounted sources. The witness further deposed that his arrangement with Mr. Gala was otherwise than on the basis of Exh. P-9. The agreement was to be executed within 15 to 20 days after making two payments of Rs.20,000/- and cash of Rs.40,000/-. The witness's attention was invited to Exh. P3 which is letter dated 5.8.1977 by the first defendant. The Plaintiff stated that he never objected to the contents of Exh. P3. After receipt of letter at Exh. P3, in Mid August, 1977, he met Mr. Gala. The witness has further deposed that in August, 1977 the said flat was available with defendant No. 1 for giving it to him. The witnesses denied that in or about January, 1977 the said flat was allotted to Manibai. The witness also denied that Mr. Gala had told him that Manibai is willing to dispose of

the said flat. The witness volunteered that no such talks took place with Mr. Gala. The witness also denied that Mr. Gala had told him that if the witness is interested, he would find out from Manibai whether she is ready to dispose of the flat and that Mr. Gala told him that before approaching Manibai to show his bona fide, he should deposit Rs.50,000/-. The witness stated that it is not true that after depositing Rs.40,000/- the witness did not deposit the balance of Rs.10,000/-. The witness volunteered that there was no such agreement for payment of Rs.50,000/-. The witness denied the suggestion that he had not paid Rs.40,000/- to Manu Gala in cash and that two cheques given for Rs.20,000/- were not towards earnest money or part payment but were towards the deposit to show his bona fides.

. Mr. Jigar Shah, Director of Defendant NO. 1 tendered his evidence by way of examination in chief on affidavit. Under Exh. D-9 he has produced the agreement dated 2.8.1974 between the first defendant and Manibai. At Exh. D-1 is letter dated 19.5.1977 by the first defendant to

Plaintiff. The two agreements being Exh. D-2 and 3 dated 2.6.1977 between first defendant and M/s. Velhari Trading Company Co. Pvt. Ltd. and 25.10.1997 between defendant No. 1 and Dhanlaxmi Trading Company. The agreement dated 11.10.1978 between the first defendant and Geneshchandra Khalicharandas which was produced at Exh. D-4. As Exh. D-5, 6 and 7 are the documents in the form of letters. It is evident that the company maintained a register of allotment of flats in Prithvi Apartments. A copy of the relevant page was tendered as Exh. 9. The witness deposed that from the records of the company, it is the transaction of purchase/sale of flats in Prithvi Apartments. During the year 1980 there were 13 transactions and 5 transactions in the year 1981. The records of the company it is pointed out shows only receipt of two cheques in the sum of Rs.20,000/- each from the Plaintiff and there is no mention of any receipt in cash of Rs.40,000/- from the Plaintiff. There is also no agreement that the flat A1 on 4th Floor of Prithvi Apartments had been agreed to be sold. It is submitted that the amount of Rs.40,000/- in aggregate by two cheques is by way of deposits and

not by earnest money or purchase price. The witness also sets out that in January, 1977 and in fact since 2.8.1974, the said flat stood allotted in favour of Manibai Parasmal. The witness has then deposed that the 1st defendant received full purchase price for the same from third defendant prior to 1980 and in the year 1980 the third defendant was put in possession thereof. It has also come on record that in the year 1987 to 1989 complete management and charge of the said building has been handed over to a Cooperative Housing Society of the flat purchasers viz. Prithvi Apartments Coop. Housing Society Ltd. In cross examination of this witness, about the agreement between Manibai and defendant No. 1, witness stated, that thumb impression was of Manibai and there was signature of Babulal director of 1st defendant company with whose signature he was familiar and he identified the same. He then sets out that on agreement there was rubber stamp of "Surrendered". The endorsement of surrender is also in handwriting under the signature. According to record of the company, this flat was surrendered. This handwriting and initials

regarding surrender were identified as of Mr. Chunibhai Gala, who was the Manager of the first defendant company. The original document was taken on record. The signature part and the endorsement of surrender part was admitted in his evidence and document is marked "Y" for identification. The letter dated 19.5.1977 having signature of Mahendra Gala was identified and was taken on record and marked Exh. D-9. The agreement between Defendant No. 1 and Velhari Trading Company was agreement at Exh. D-2. The document between Defendant No. 1 and Dhanlaxmi Trading Company is at Exh. D-3. The document between Ganeshchandra and Defendant No. 1 is at Exh. D-4. The page bearing stamp of Income Tax Department of January, 1979 was produced which contained details of the sale of flats which was maintained according to witness by Defendant No. 1 in usual course of business. It looks like a part of the book, maintained by the Defendant No. 1 company. It was admitted that the agreement between Manibai and Defendant No. 1 was not registered. The witness stated that he is not aware whether Manibai was alive. The witness has deposed that in the year 1977, defendant No. 1

company was maintaining documents like sales register, receipt book, list of purchasers of the flats, names and addresses of the purchasers, which were required to be maintained under the Maharashtra Ownership of Flats Act. The page produced was original registered being Exh. D-8. The witness volunteers that the original register was available. He would produce the same. In so far as letter dated 19.5.1977, Exh.D-1 the witness admitted that it does not show address of the person to whom the letter was sent. The witness denied that the letter was never sent. The agreement dated 2.8.1974 between defendant No. 1 and Manibai was marked as Exh. D-9. The witness admits that there is no record to show that Plaintiff was called upon to make payment between January, 1977 and June, 1977. The construction of the building, according to the witness, started in 1971-72 and was completed in 1980-81. The witness was shown Exh. P-2 which was receipt dated 6.1.1977 which shows the flat to be purchased is flat No. A1/4. The witness states that it was a deposit receipt. No other condition was incorporated. The witness admits that there is no

mention of clearance from any other purchaser. The witness denied that apart from two cheques, additional sum of Rs.40,000/- was paid in cash. The witness states that to his knowledge there was no advertisement in newspaper about availability of flat in the suit building for sale in the year 1977-78. The witness states that he was not able to trace the despatch register of the year 1977-78 but he produced original register of the flats. The witness deposed that Page No. 1 of the register was already produced in the court. He also deposed that Mr. Vasant Gada was maintaining the accounts of the defendant No. 1 company and he was not aware as to how Plaintiff approached Mahendra Gala. The witness denied that there was oral agreement between Manu Gala and Defendant No. 1 and Plaintiff to sell flat No. A-4 admeausring 1623 sq. ft. @ Rs.152 per sq. ft.

. Mr. Vasant Dharamshi Gada was examined as D-2. He identified hand writing in the agreement at Exh. D-2, D-3 and D-4 as his. He stated that the writing were done by him at the instance of Manager Mr. Chunilal Gala who at the time of deposition

was not alive. He identified his signature on Exh. D-2 as also signatures of the Director Mr. Gala. When the agreements D-2 and D4 were put to him he deposed that they were signed in the office of Mr. M.G. Gala in his cabin and purchasers were present at the time of signing the agreement. The witness deposed that in so far as Exh. D-8 is concerned, the portions encircled in red ink on this document are in his hand writing. Some other writings are in the hand writing of Mr. Markand Modi, who was the accountant and he identified his signature. The account books were also produced and exhibited. In cross examination he stated that he was working as Assistant Accountant with defendant No. 1. company and that Mr. Markand Modi was the accountant. It was Markand who used to maintain flat purchase register. In respect of document Exh. D-3 he reiterated that it were in his handwriting so also D-4 and D-3 He stated that there was no agreement with the Plaintiff.

. In a suit for specific performance, it is incumbent on the plaintiff to establish that there was a concluded contract either oral or documentary

and that the terms of the contract were settled and that the Plaintiff was either ready and willing to perform his part of the contract.

9. Let us therefore, examine whether the Plaintiff has been able to establish the said fact. At the same time, it may be noted that the defence of defendant No. 1 is that at the relevant time Flat A1/4 on the 4th floor was not available as it was standing in the name of Manibai. That document is on record. The signature of Manibai has not been proved. Apart from that the receipt Exh. P2 would clearly show that it was against the deposit for Flat No. A-1 on the fourth floor in Prithvi Apartment at Altamount Road. Nothing has been brought out in the evidence that on the date when Exh. P2 was issued, that there were no other flats available and on the contrary, there is evidence to show that 13 transactions had taken place in the year 1980 and 5 transactions in the year 1981. It will therefore, not be possible to accept the contention as advanced on behalf of the defendant No. 1 that the said amount of Rs.40,000/- was paid only as and by way of deposit to show bona fides to

enable the defendant No. 1 to discuss the issue with Manibai who was interested in disposing the flat. As such Plaintiffs have been able to establish that there was an understanding between Plaintiff and defendant No. 1 for sale of flat A-1 on the 4th floor. The question is whether there was a concluded contract by way of agreement between Plaintiff and defendant No. 1 to sell the said flat to Plaintiff. We have examined the documentary evidence as well as oral evidence. From the plaint the relief as prayed for by the Plaintiff in the suit as amended is that defendant No. 1 should be called upon to sign the agreement as per agreement, a copy of which was given to Plaintiff. In other words, case of the Plaintiff is that what is to be specifically enforced is draft agreement which was handed over by the defendant No. 1 to Plaintiff. As may be noted this was introduced by amendment to the plaint and consequently also prayer clause being Prayer Clause (a)(i) was introduced to that effect. The next question therefore, is whether the Plaintiff has established as to what was the consideration for the said flat. In his evidence, in Para 4 it was

set out that price was Rs.152/- per sq. ft. and Plaintiff paid two amounts in the sum of Rs.20,000/- each and further amount of Rs.40,000/- in cash for which no receipt was given. In the pleadings, the case as put up is that the cost of the flat was Rs.152/- per sq. ft. in respect of which sum of Rs.80,000/- had been advanced by the Plaintiff to Defendant No. 1. In the letter addressed on behalf of Plaintiff dated 5.1.1978 Exh. P-4 the Plaintiff set out that the agreed price of the flat was Rs.152/- per sq. ft. out of which Plaintiff agreed that Rs.40,000/- will be paid by cheque and further amount will be paid in cash for which no receipt would be passed and that the balance amount would be paid towards the price of the flat against delivery of possession. In the oral evidence, witness has deposed that the price was Rs.152/- per sq. ft, was to be reflected in the agreement. Apart from that defendant No. 1 had asked the Plaintiff to pay him certain amount in cash which was not to be reflected in the agreement. It was over and above Rs.152/-. The witness states that he was not sure but he thought he was asked to pay Rs.40,000/- cash, that was over

and above Rs.152/- per sq. ft. The witness has further deposed that the defendant No. 1 told him that they would inform Plaintiff of progress of the construction and then he should make payments slabwise. Plaintiff has further deposed that Defendant No. 1 had not asked him to make payment as per Clause 4 of Exh. 99 but had told him to pay as stated by the Plaintiff above. In further cross it is set out that the arrangement with Mr. Gala was otherwise than on the basis of Ex.P-9. He further states that the agreement was to be executed after two payments of Rs.20,000/- and cash of Rs.40,000/-. The witnesses' attention was invited to Exh. P2.

10. From this evidence what emerges is that the Plaintiff is unclear as to whether the price of the flat was to be paid at the rate of Rs.152/- per sq. ft. or any additional amount over and above Rs.152/- per sq. ft. was to be paid. In other words, considering the pleadings and the evidence, Plaintiff has not been able to discharge the burden of showing that there was agreed price for the flat. The other evidence is that the Plaintiff's

stand in his pleadings and evidence in examination in chief as also letter Exh. P-3 is he had to pay balance of the amount on delivery of possession. The prayer clause in the suit is that the relief must be granted in terms of the draft agreement. That agreement provided for payment by instalments. Yet another aspect of the matter is that though there is denial of receipt of letter dated 19.5.1977, there is no denial of letter dated 5.8.1977. The reply to this letter was only sent on 5.1.1978 i.e. more than five months thereafter. The only explanation given is that because of his pre-occupation, Plaintiff could not write to defendant No.1. In his evidence, Plaintiff contends that he tried to meet Gala who had assured him and in these circumstances,he had not written to him earlier. If it really was the case of the Plaintiff that in between the letters dated 5.8.1977 and 5.1.1978 he had met gala and discussed with him there is no whisper of the same in Exh. P4. On the contrary the only explanation given by the witness is that he was pre-occupied and as such could not reply. It is not possible to accept the contention of the Plaintiff that inspite of letter

dated 5.8.1977 informing that if the amount was not collected within seven days, it will be forefeited. Plaintiff chose to keep silence for over five months. This to some extent gives support to the stand of the defendants that the sum of Rs.40,000/- was paid to show bona fides before defendants could approach Manibai for cancellation of agreement between defendant No. 1 and Manibai. There is a contemporaneous document to show that in between, flats had been sold to others. Exh. D-8 is the document recording the transaction of flats in the book maintained by the Plaintiff. This book was seized by the Income Tax Authorities in January, 1979. Suit was filed by the Plaintiff on 19.5.1980. That evidence will have to be considered and that will indicate that stand of the Plaintiff that the suit flat is sold to others is supported by the documentary evidence on record. On the contrary, there was no agreement in writing between Plaintiff and defendant No. 1. From the nature of the transaction, therefore, Plaintiff has been unable to establish that there was an oral agreement entered into between Plaintiff and defendant No. 1 under which they were to sign

written agreement in terms of the printed blank agreement given to the Plaintiff by Defendant No. 1. The Plaintiff has also been unable to discharge the burden in so far as price of the flat is concerned and the mode of payment. Once that be the case, it will be difficult to hold that there was a concluded contract between Plaintiff and defendant. A finding will have to be recorded in favour of the defendant and against Plaintiff that there was no concluded contract. Therefore, it will have to be held that the relief by way of specific performance cannot be granted and consequently the issue to that extent will have to be answered accordingly.

11. That leaves us with the next issue as to whether the Plaintiff in the alternative is entitled for the damages. The plea for damages could have been entertained, if the Plaintiff had been able to establish that there was concluded agreement and that agreement could not be specifically enforced and as such in the alternative the Plaintiff is entitled for damages. As the agreement itself has not been proved, the

question of payment of damages would not arise. Apart from that except for the bare statement in the evidence that when the suit was filed the price in the locality was Rs.400/-. No evidence has been produced by the Plaintiff to show the price of flats in the vicinity. There is also nothing on record to show that the Plaintiff took any step to mitigate the damages by trying to purchase any other flat in the vicinity. In these circumstances, the Plaintiff would not be entitled to prayer for damages. That issue will have to be answered accordingly.

12. That brings us to the issue as to whether the Plaintiff is entitled to reliefs for refund of the amount of Rs.80,000/- or defendants No. 1's contention has to be accepted that the said amount has been forefeited. In so far as Rs.40,000/- by cash is concerned, it is the word of the Plaintiff against defendant. There is no documentary evidence and as such it will not be possible to accept the contention of the Plaintiff that sum of Rs.40,000/- was paid in cash. That leaves us with the issue in so far as the balance amount of

Rs.40,000/- which was received by cheques. It is the case of the defendants that they have forefeited the amount and did give notice of the same to the Plaintiff by letter dated 5.8.1977. It may be mentioned here that the entire case of the defendant from their pleadings is that the said sum of Rs.50,000/- was to be deposited by the Plaintiff to show his bona fides to get the agreement terminated with Manibai out of which plaintiff paid only Rs.40,000/-. In other words this was not the sum towards the cost of the flat. It was therefore, not earnest money which could be forfeited by the defendant. There was also no agreement in writing providing for forfeiture. The amount according to defendant No. 1 himself was to enable defendant No. 1 to enter into negotiations with Manibai. The amount to be deposited was Rs.50,000/-. Only a sum of Rs.40,000/- was deposited. If that be the case, defendant No. 1 surely could not have entered into negotiations with Manibai. The said amount therefore, had to be returned to Plaintiff and as such Defendant No. 1 could not have forfeited the said amount and the Plaintiff will be entitled to the decree in the sum

of Rs.40,000/-. On behalf of Defendant No. 1 their learned counsel has placed reliance in the judgment of the Apex Court in National Highway Authorities of India Versus M/s. Ganga Enterprises and another, AIR 2003 SC 3823. In that case, bid security was given to meet specific contingency viz. non-withdrawal of offer within 120 days. The bid however, was withdrawn before expiry of the bid validity. It is in these circumstances, that the Apex Court held that it was open for the appellants before it to forfeit the bid amount. This judgement would clearly be not applicable as according to defendant No. 1 themselves the amount was to be deposited to enable them to open negotiations with Manibai.

13. What then is the interest the principal amount will carry. There was no agreement in writing. Therefore, at the highest from the date of the suit and bearing in mind Section 34, Plaintiffs on the sum of Rs.40,000/- will be entitled to interest at the rate of 6% from the date of the suit till judgement and further interest at 6% on Rs. 40,000/- from the date of the judgement till

payment.

14. On behalf of the Plaintiff, learned counsel points out that the Plaintiffs herein has deposited the balance amount towards the purchase price before this court. The said amount deposited will have to be returned to the Plaintiff alongwith accrued interest, if any. The suit therefore, can be disposed of in the following terms :

15. The suit is partly decreed in as much as defendant No. 1 is directed to pay to Plaintiff a sum of Rs.40,000/- with interest thereon at the rate of 6% p.a. from 19.5.1990 till judgment and thereafter also at 6% p.a. on principal amount of Rs.40,000/- from the date of judgment till payment. Considering that the suit is pending in this court for last more than over 25 years, defendants are directed to pay to the Plaintiff the said amount within twelve weeks from today.

. Considering that the suit is partly decreed, defendant No. 1 to pay to the Plaintiff costs quantified at Rs.10,000/-.

. The Prothonotary & Senior Master to return to the Plaintiff the amount deposited along with interest on production of an authenticated copy of this judgement.

(F.I. REBELLO,J.)